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T.R.A. DOCKET ROOM
April 8, 2004

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VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with
BellSouth Telecommunications, Inc. Pursuant to the
Telecommunications Act of 1996*
Docket No. 03-00119

Dear Chairman Tate

BellSouth writes in response to the letter submitted by DeltaCom to the Authority on April 6, 2004 urging the TRA to order a rate in the DeltaCom Arbitration for switching in Nashville. In that letter, DeltaCom did not merely present a request to place the arbitration on the next Conference Agenda. Instead, DeltaCom took the opportunity to argue the merits of its position. BellSouth responds below to that argument.

As the Authority is well aware, Issue 26(c) addresses BellSouth's offering of unbundled switching in situations where BellSouth is not required to provide switching as a UNE available at TELRIC rates. The situation in Tennessee is unique to Nashville.¹ As DeltaCom points out, Issue 26(c) was framed as follows:

¹ In the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, November 5, 1999 ("UNE Remand Order"), ¶¶ 253, 285, the FCC created an exception to its rules requiring that ILECs provide unbundled switching at UNE rates. Finding that CLECs were not impaired in the Nation's top 50 MSAs were serving customers with at least four lines, the FCC exempted such locations from the requirement to provide switching at UNE rates. Nashville is the only area in Tennessee to which this exception applies. There is no jurisdiction in a 252 arbitration to consider – much less to set – rates for services that are not required to be provided at UNE rates. Accordingly, BellSouth has vigorously maintained that the Authority does not have jurisdiction to set market rates in these areas. Yet, CLECs have a forum to address this matter – the FCC. Only the FCC has jurisdiction to determine whether market rates are just and reasonable in the event of a dispute. BellSouth strongly disagrees with the determination that the Authority has jurisdiction to set market rates in this instance.

Is BellSouth required to provide local switching at market rates where BellSouth is not required to provide local switching as a UNE? If so, what should be the market rate?

DeltaCom's letter then quotes Chairman Tate that (1) BellSouth's proposed rate was rejected since "BellSouth cannot support or justify that rate as just and reasonable or required by FCC rules" and (2) "... the panel rejected the TELRIC rates proposed by ITC^DeltaCom because 'it would not be a rational interpretation of the FCC rules to price non-UNE network elements the same as UNEs.'" DeltaCom then states that the TRA should make a decision on the final and best offers filed, suggesting that DeltaCom's best and final offer is something other than a TELRIC-priced UNE rate. This position is disingenuous. By both its offer and April 6 letter, DeltaCom continues its efforts to take the "market" out of "market rate".

DeltaCom's offer of \$5.08 for unbundled switching -- **including usage at no additional charge** -- is materially indistinguishable from the TELRIC rates already established in Tennessee for switching and usage. By comparison, the TELRIC rate for switching is \$1.89 and the average Tennessee usage, at the TRA-set TELRIC rate is approximately \$3.23 monthly. Consequently, DeltaCom offers to pay \$5.08 for a service regarding which the Authority has set a TELRIC rate of \$5.12. (See attached chart). It is clear, when the DeltaCom offer is actually compared "apples to apples" with TELRIC pricing, that their offer is not a market rate, but rather a plea to obtain TELRIC pricing for switching in Nashville even though the FCC has rejected that plea in the past. DeltaCom's attempt to "TRIC-ize" the market rate is particularly hard to reconcile with the recent D.C. Circuit Court Opinion. The perverse nature of this position is proven by dissecting DeltaCom's \$5.08 rate, particularly the fact that the \$5.08 rate includes all usage. Given the scant (4 cent) margin between DeltaCom's rate and the TELRIC rate (with average usage), if DeltaCom's rate is used and if DeltaCom exceeds average usage, DeltaCom will have succeeded in getting a "market" rate that is **below** the TELRIC rate.

During this case, DeltaCom has insisted that its proposal is consistent with BellSouth's own cost data provided to the TRA. This position is most revealing. The cost data referenced by DeltaCom is exactly that -- **cost data provided in the context of a TELRIC proceeding**. While cost data is relevant to TELRIC analysis, it is simply not relevant to a market analysis. Throughout this proceeding, DeltaCom has attempted to characterize BellSouth's market rate as "unsupported". The fact is, however, that BellSouth's offer need not be supported with **cost** data. Cost data is the type of information used to consider to cost-based rates under TELRIC analysis.

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BellSouth's costs, however, are not relevant to a market rate. The record in this proceeding is clear that BellSouth did, in fact, present evidence that other CLECs are paying rates consistent with the market rate BellSouth has offered to DeltaCom. This evidence, unlike cost evidence, is relevant to whether a market rate is just and reasonable. If the FCC were to evaluate a claim that such a market rate was not just and reasonable, then it would clearly look to evidence of what is happening among other players in the market. DeltaCom clearly hopes to have the TRA set a "market" in the same fashion, and using the same data, as TELRIC rates are set. Such a process will produce a rate that is "market" in name only -- a rate that waddles and quacks like the TELRIC duck it really is. Obviously, DeltaCom cannot turn the market rate concept on its head in that fashion in order to achieve a TELRIC rate to which it is not entitled.

DeltaCom continues to discuss the rate solely in the familiar TELRIC-style analytical framework, which is inapplicable to the issue. DeltaCom is, in effect, inviting the TRA to turn a blind eye to the truth of DeltaCom's offer -- the fact that it is virtually indistinguishable from a TELRIC-based rate -- in an attempt to achieve a TELRIC-based rate and just call it by another name. The Authority should reject DeltaCom's invitation to set a TELRIC-based rate when the Authority has already decided that TELRIC rates simply do not apply to unbundled switching in Nashville, consistent with the FCC's decision.

The bottom line is that DeltaCom hopes to reframe the market-based issue into a TELRIC-based issue. In order to do so, DeltaCom consistently returns to cost-based arguments relating to this issue. A common sense approach reveals that the use of cost-based analysis to set a market rate is the equivalent of rejecting a market-based rate altogether and instead setting a TELRIC-based rate. This is inconsistent with the "current statutory and regulatory requirements" referenced by DeltaCom in its April 6 letter.

Perhaps most importantly, DeltaCom's letter could not be more inconsistent with the recent pronouncement of a now unanimous FCC. As DeltaCom notes in its letter, all five members of the FCC have now urged carriers to engage in negotiation to resolve switching-related issues. DeltaCom pays lip service to this call for negotiation, while ignoring the reality that if the TRA rules on this issue, there will be no reason for the parties to continue to negotiate to resolve these issues of price. Obviously, if the Authority orders a rate, the party who is satisfied with that rate will have absolutely no incentive to engage in negotiations. Thus, DeltaCom's suggestion that a TRA ruling on this issue will not chill negotiations is preposterous.

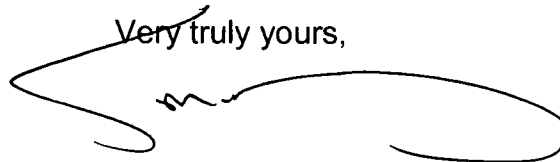
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The nine-month window for this arbitration had run months before the TRA deliberated its decision. DeltaCom made no complaint with respect to that time window, and in fact, there is no legal reason why the Authority need disrupt the balance of negotiations by ruling on this issue right now. In fact, DeltaCom and BellSouth are scheduled to meet next week to negotiate regarding the Commercial Offer that BellSouth has made and regarding which there has been reference in the media and in this docket. BellSouth urges the TRA to act consistently with the call of the FCC. The FCC's call to parties to negotiate will be futile if state public service commissions step in before such negotiations are completed and impose rates or terms ahead of the parties' negotiations.

Tennessee is not unique within BellSouth's region with respect to this pending issue. The DeltaCom arbitration has proceedings in other states as well. No other state commission elsewhere in BellSouth's region has any imminent plans to rule on the market switching rate. Consequently, any Tennessee ruling will not only have an effect on Tennessee negotiations, but also on negotiations throughout the region.

For all these reasons, BellSouth urges the Authority to refrain from ordering a rate and to hold its deliberations in further abeyance until such time as parties have had a chance to do what the FCC has called upon them to do.

Very truly yours,

A handwritten signature in black ink, appearing to read "Guy M. Hicks", with a large, sweeping loop at the end.

Guy M Hicks

GMH:ch

	DeltaCom's Best and Final	TRA TELRIC UNE standalone	Lower TRA TELRIC for UNE-P (together)
Switch port with features	5.08	1.89	1.89
Usage	Free	3.23 ¹	3.23
Subtotal for switching/usage combo	5.08	5.12	5.12
Loop	11.74	11.74	10.92 ²
TOTAL for UNE-P	16.82	16.86	16.04

¹ This figure is based on the TRA's usage rate per MOU and average usage characteristics consistent with FCC data. Accordingly, we think the \$3.23 is a reliable number.

² The loop in this column has been reduced to reflect the TRA-set rate for the loop/switch combo (UNE-P).

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

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